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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 67

SAM (SALVATORE) DiPIAZZA,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

GUY JOHNSON
812 Pere Marquette Building
New Orleans, Louisiana 70112
Attorneys for Petitioner.

LOUIS A. DI ROSA
812 Pere Marquette Building
New Orleans, Louisiana 70112

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OPINION BELOW

The opinion of the Court of Appeals is reported in F. 2d, and is included herein as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered September 11, 1969, Nos. 18593-18594. Appendix A. The petition for rehearing was denied November 18, 1969. Appendix B.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 605 of the Federal Communications Act of 1934, Clause 1, prohibits a telephone company from disclosing the records of a subscriber's toll calls to a law enforcement agency in response to a "John Doe" summons issued by the Internal Revenue Service under 26 U.S.C. §7602.

STATUTE INVOLVED

The Communications Act of 1934, Section 605, Clause 1, 48 Stat. 1103, 47 U.S.C.A. § 605 (1962 ed.) provides:

> "§ 605. *Unauthorized publication or use of communications*
>
> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; . . . ."

The Communications Act of 1934, Section 605, Clause 1, as amended by the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, Title III, § 803, 82 Stat. 223, 47 U.S.C.A. § 605 (1969 Supp.) provides:

> "§ 605. *Unauthorized publication or use of communications*
>
> Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority . . . ."

26 U.S.C. §7602. *Examination of books and witnesses*

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect

of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 901

STATEMENT OF THE CASE

The following chronology, it is hoped, will serve to produce sufficient detail of the circumstances leading to this conviction. And, it is believed that nowhere therein — or in this entire record — is there any evidence that the Internal Revenue Service was investigating the civil tax liability of Sam DiPiazza. The six steps to conviction are as follows:

1. This record reveals that both the highest level FBI and the IRS sources admitted extensive electronic surveillance of Sam DiPiazza prior to January 8, 1966. Court exhibits 2 and 3 are official reports of both services in which this acknowledgment is made. Appendix C and D.

II. On January 8, 1966, Sam DiPiazza was arrested in New Orleans in the very place that had been subjected to electronic eavesdropping. On his person was the Cincinnati telephone number of the co-defendant, Demming.

III. January, 1966. As the majority opinion states the trial judge made no specific finding as to the date, but found that sometime during January the IRS received the report that:

> "An IRS intelligence agent in Las Vegas had a suspected bookmaker under eyeball surveillance, observing him to make a number of calls from a certain phone, obtained the records regarding such calls from the telephone company, discovered one to be Cincinnati 791-4793, listed under the name of Harry Acker, 3808 Woodford Road, Silverton, Ohio."

IV. On January 17, 1966, the first of a series of "John Doe" summons was issued for the records of the telephone subscriber to the number found on DiPiazza during his January 8, 1966, arrest — which coincidentally was the same number that the Las Vegas gambler called.

V. June, 1966. The IRS Cincinnati office was informed that one of their special agents had placed several bets with a bookmaker in Louisville, Kentucky. This agent also reported that from the evidence available in Louisville this bookmaker was calling the same Cincinnati number that had been brought to the attention of the IRS, Cincinnati, by:

1) Records found on the person of Sam DiPiazza when arrested on January 8, 1966.

2) The Las Vegas special agent.

3) Possibly by the 90 hours of electronic eavesdropping conducted by both the IRS and FBI prior to the January 8 arrest of Sam DiPiazza.

VI. July 1966, search warrants predicated on the toll record information were obtained and other evidence was seized that led to the indictment, trial and conviction of Sam DiPiazza.

REASONS FOR ISSUING THE WRIT

"SEARCHES CONDUCTED OUTSIDE THE JUDICIAL PROCESS, WITHOUT PRIOR APPROVAL BY JUDGE OR MAGISTRATE, ARE PER SE UNREASONABLE UNDER THE FOURTH AMENDMENT."

The quotation is from Justice Stewart in the monumental Katz v. United States, 389 U.S. 347, 357 (1967).

"WHEN THE GOVERNMENT CONDUCTS SEARCHES FOR EVIDENCE OF CRIME IT MUST PROCEED BY LAWFUL AUTHORITY. NO LESS IS REQUIRED UNDER § 605 WHICH EMBODIES A CONGRESSIONAL MANDATE THAT THE PRIVACY OF TELEPHONE USERS SHALL BE FREE FROM ARBITRARY INVASION BY GOVERNMENT OFFICIALS. CONSEQUENTLY, THE U.S. SUPREME COURT HAS HELD THAT WHEN SUCH AN INVASION DOES TAKE PLACE EVIDENCE SEIZED AS A RESULT MAY NOT BE USED IN A CRIMINAL PROSECUTION AGAINST THE PARTIES TO THE COMMUNICATION, IN THESE CASES, DEMING AND DI PIAZZA. THESE HOLDINGS ACCORD WITH THE RULE EXCLUDING EVIDENCE SEIZED IN VIOLATION OF THE FOURTH AMENDMENT, TO WHICH § 605 HAS OFTEN BEEN EQUATED."

The quotation is from the dissenting opinion of Judge Celebrezze in this case. The dissent is documented by Reisman v. Caplin, 375 U.S. 440 (1964) which earlier considered the legality of the seizure of criminal evidence by the administrative procedures authorized by the Internal Revenue Service 7602 summons, and which, in perfect accord with the Justice Stewart statement, held that the Internal Revenue Service summons could not be used for the gathering of evidence for a criminal prosecution.

The perfect accord with the Fourth Amendment precept of Katz relates to the basic question presented in this application. Does 47 U.S.C. 605 equate to the Fourth Amendment, and are toll records protected by 605. The majority and minority opinions in this case say yes.

But, presently pending and undecided at this writing is the matter of Joseph Covello v. United States of America, No. 240, October term, Supreme Court of the United States, wherein on a petition for rehearing this Honorable Court is considering the validity of a Second Circuit ruling, wherein toll records were not accorded the protection of 47 U.S.C. 605. In fact, the Covello toll records were released without the semblence of even an administrative order.[1]

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[1]To quote broadly from the Covello application, it is apparent that the problem of the application of 605 to toll records has not been settled by recent amendments thereto. The Covello application points to an even more complicated question that must be resolved. Therein they said:

> "In another decision handed down the same day as DiPiazza . . . the Sixth Circuit remanded to the United States District Court for the Eastern District of Michigan, the case of United States and Richard Daguanno, Special Agent, Internal Revenue Service v. Michigan Bell Telephone Co., 6 CrL 2027, No. 19073 (6th Cir. Sept. 11, 1969). . . . The remand was to consider whether the construction of Section 605 in DiPiazza v. United States, supra, was affected by the amendment of Section 605 by Title III, §03, of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, which had been enacted subsequent to the District Court decision in DiPiazza but prior to the District Court decision in United States and Daguanno v. Michigan Bell Telephone Co. The question presented in the instant petition would also appropriately involve consideration of the effect of the amendment to Section 605 enacted by the Omnibus Crime Contral

There is also the matter of Nolan v. United States, No. 9,730 in the United States Court of Appeals for the Tenth Circuit in which 20,000 telephone toll records were used to prove interstate gambling. The contention that these toll records were entitled to the protection of the Fourth Amendment, or 47 U.S.C. 605 safeguards, was summarily dismissed as they were not proof of the "existence" of a telephone conversation, but were considered "business records". And incredibly the Tenth Circuit cites as authority for this proposition — this very DiPiazza case. This statement of the "business record"

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and Safe Streets Act of 1968. Although the Court of Appeals for the Second Circuit stated in the instant case: 'The recent amendment to 47 U.S.C. § 605 by the Omnibus Crime Control and Safe Streets Act of 1968 does not alter the substance of the original statute set forth in the text above' . . . a substantial question exists as to whether Congress worded amended Section 605 so as to make it mean the opposite of original Section 605, Clause 1. The amended Section 605 appears by its terms to prohibit divulgence of those telephone company records covered by Clause 1 even when they are sought by subpena or other legal process. The amended version of Section 605 provides:

'Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction or (6) on demand of other lawful authority . . .' "

47 U.S.C.A. § 605 (1969 Supp.)

quality of the DiPiazza toll records, despite the explicit opening paragraph in the dissent to the effect:

> "I agree with the majority that telephone company toll records containing an individual's long distance calls are protected by § 605 of the Communications Act."

The Tenth Circuit specifically misconstrued the above when they referred to the toll records of Nolan and said:

> "These toll records are kept on every customer and do not lend themselves to use for surveillance as the pen register does. We think these records are entitled to the same treatment as the records of other businesses (see Federal Business Records Act, 28 U.S.C.A. §1732 (1966), and that § 605 is inapplicable to them. United States v. Covello, 410 F.2d 536 (2d Cir. 1969); DiPiazza v. United States, 6 Crim. L. Rep. 2025 (6th Cir. Sept. 11, 1969)."

It must be concluded that either here or later the Courts will have to explicate "the demand of lawful authority" if it exists outside the Constitutional concept of lawful searches and seizures.

The Nolan, Covello, DiPiazza and Daguanno cases all present conflicts between the Tenth, Second and Sixth Circuits as to the means of procuring evidence for a criminal prosecution. The security of the individual, and his right to privacy, we respectfully submit should be resolved at the highest level.

THERE WAS A POSSIBILITY THAT THERE WCULD BE A FINDING OF CIVIL TAX LIABILITY.

This is exact quotation from the majority opinion. The POSSIBILITY of the discovery of incriminating materials does not justify the invasion of privacy and certainly signifies disregard of Fourth Amendment safeguards, and the Chimel principle Chimel v. State of California, 89 S.Ct. 2034 (1968) of the limitation of authorized searches.

Petitioner believes the Chimel principle may have altered or limited United States v. Powell, 379 U.S. 48 (1964) and Ryan v. United States, 379 U.S. 61 (1964) wherein the 7602 summons was granted enforcement when the investigation may produce both civil and criminal evidence. But there is no need for a review of the applicability of those precedents, for therein the Court says that the Internal Revenue Commissioner must show that the investigation is "pursuant and relevant to" a legitimate purpose. Or, as it is said in 7602, to:

> "ascertain the correctness of any return where none has been made, determine the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability..."

So, if the majority can only find that "there was a possibility that there would be a finding of a civil tax liability" there is only a "possibility" that the highly questionable administrative procedure was followed.

CONCLUSION

The growing constitutional definition of the right of privacy in Berger and Katz cannot be ignored. This overall record reveals deliberate and repeated efforts to maintain a conviction by legitimation of rank constitutional intrusions in the private affairs of the accused.

Appendix C and D are included not only to document the factual background, but to show the completely logical sequence of the government snooping that culminated in the mass of toll records which gave the government documentary proof of what they already knew, or could have known. The petitioner believes that he has been denied a judicial determination of the validity of the government evidence and by no means intends to deny or waive any of his rights to the error asserted in detail at the Circuit level.

A direct attack on the end product of all government snooping — the telephone toll records — and the "legalization" thereof in the majority opinion by the substitution of the Internal Revenue Service summons device for constitutional processes, is the oft repeated plea for some judicial resolution of the quality of the government evidence.

Telephone toll records are proof of the "existence" of telephone communications according to this case. The Second and Tenth Circuit have found otherwise. Petitioner believes this decision is correct — to that degree — but that new constitutional concepts as to the

rights of privacy have been added by Chimel and Katz and that criminal evidence of the "existence" of private telephone conversations may not be gathered ". . . outside the judicial process. . ."

GUY JOHNSON
Pere Marquette Building
New Orleans, Louisiana 70112

LOUIS A. DI ROSA
Pere Marquette Building
New Orleans, Louisiana 70112

PROOF OF SERVICE

I, GUY JOHNSON, attorney for petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari upon the Solicitor General, Department of Justice, Washington 25, D.C., and the United States Attorney for the Southern District of Ohio; Western Division, Post Office Building, Cincinnati, Ohio.

New Orleans, Louisiana, December ____ ,1969.

APPENDIX A

Nos. 18593-18594
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAM (SALVATORE) DiPIAZZA
Defendant-Appellant,
v.

UNITED STATES,
Plaintiff-Appellee.

WILLIAM CLYDE DEMING,
Defendant-Appellant,
v.

UNITED STATES,
Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Ohio,
Western Division.

Decided September 11, 1969.

Before: PHILLIPS and CELEBREEZE, Circuit Judges, and McALLISTER, Senior Circuit Judge.

PHILLIPS, Circuit Judge. DiPiazza and Deming appeal from their convictions under 18 U.S.C. §§ 371 and 1952 on seven counts of use of interstate telephone facilities for carrying on a business enterprise of gam-

bling in violation of state law and one count of conspiracy so to carry on that business. They were found guilty on all counts by a jury after a lengthy trial before District Judge David S. Porter.

The voluminous evidence introduced by the Government established a large scale interstate illegal bookmaking and layoff gambling operation. This operation was carried on by telephone between Cincinnati, Ohio, Fort Thomas, Kentucky, New Orleans, Louisiana, and other points. According to the evidence DiPiazza primarily was based in New Orleans and Deming in Cincinnati. The gambling enterprise between these two defendants was shown to have exceeded $400,000 in one month.

Appellants challenge the Government's obtaining certain telephone company long distance toll call records, the Government's use of the toll records, and the sufficiency of search warrants under which the bulk of the evidence against the appellants was seized. Other errors alleged will be mentioned later in this opinion.

In January 1966 special agents of the Internal Revenue Service at Cincinnati received a communication from the Internal Revenue Office at Las Vegas, Nevada, requesting that a telephone number be checked, information having been received that it was being called by Las Vegas bookmakers. The number was determined to be located in the basement apartment at 3808 Woodford Road, Silverton, Ohio, a Cincinnati suburb.

In June, 1966 a special IRS agent at Louisville informed the Cincinnati office that an undercover agent

had placed bets with a certain person who had been using two telephones in Lexington, Kentucky. From the toll records of the Woodford Road telephone it was determined that calls had been placed from that number to the two Lexington numbers.

The telephone at 3808 Woodford was listed to Harry Acker, a fictitious listing. Surveillance by IRS agents disclosed Deming to be a frequenter of the Woodford premises. Examination of telephone company toll records, obtained by IRS summons, revealed that the telephone at 3808 Woodford and the telephone at Deming's residence in Fort Thomas, Kentucky, had been and were being used to make numerous toll calls to persons known to be prominent bookmakers in various cities.

Based upon the affidavits of Special Agent Guy I. Wetherell, IRS Intelligence Division, search warrants were issued. The warrant for the 3808 Woodford address was issued by a United States Commissioner for the Southern District of Ohio. The warrant for Deming's residence at Fort Thomas was issued by a United States Commissioner for the Eastern District of Kentucky.

The raid on the Woodford Road property was led by Special Agent Frank Carrington, who at the time of the trial was on a Ford Foundation grant and assigned as a legal advisor to the vice squad of the Chicago Police Department. He is a licensed attorney and a graduate of the University of Michigan Law School.

Deming was present at the Woodford address when the search warrant was executed there. A paper sack was seized containing betting records that had been torn into thousands of small pieces. More than 20,000 pieces of paper were reassembled by Carrington and agents under his control. Carrington identified these reassembled documents, testifying that they included bet slips, balance sheets and "recap" sheets, all pertaining to the bookmaking and lay-off horse betting operation between Deming and other individuals, including DiPiazza. Deming conceded that each one of these reconstructed slips was written solely in his own handwriting.

A raid on Deming's residence at Fort Thomas also produced racing forms, telephone toll records and gambling paraphernalia.

The FBI raided DiPiazza's hotel room in New Orleans on January 8, 1966, which was within the period of the conspiracy charged in the indictment. Papers taken off DiPiazza contained Deming's telephone numbers in Fort Thomas and on Woodford Road. Deming's Fort Thomas telephone had an unlisted number. It was shown in DiPiazza's papers as the equivalent of the Woodford Road telephone number. This established, in conjunction with other evidence, a connection between DiPiazza and Deming.

Toll records of the Cincinnati and Suburban Bell Telephone Company were subpoenaed and put into evidence. These are records which were maintained by the telephone company in the ordinary and normal course of its business for the Deming telephones at Woodford

Road and at Fort Thomas. These records disclosed hundreds of calls, often as many as five per day, to premises occupied by DiPiazza in New Orleans, and calls to the Hilton Hotel in New York at times when DiPiazza was registered there. The search of Deming's apartment, residence and automobile produced duplicates of most of these same toll records.

We find no reversible error in the record and affirm the convictions.

1) The Toll Records

The principal issue on this appeal is whether the Government's evidence of the telephone calls in question was secured by the wrongful procurement of the telephone records in violation of Section 605 of the Communications Act, 47 U.S.C. §605. This question arises first with respect to whether these was probable cause for the issuance of the seach warrants. It is further contended that the evidence was unlawfully introduced and received at the appellant's trial.

A.

Appellants contend that the toll records of long distance telephone calls constitute an "interception" of a message in violation of section 605.

The toll records obtained by IRS in its investigation are the same type of long distance records kept by the telephone company for all telephones. These records contain substantially the same information that is furnished each month to the customer as a part of his

billing, i.e., the date of the call, the destination called, the telephone number to which each call is placed, the telephone number where the call originated, and the amount of the charge for the service. These records contain no information as to the persons participating in the call or the subject matter of the conversation.

A telephone subscriber or user authorizes the telephone company to intercept his calls to the extent reasonably necessary for purposes of computing his telephone charges. See *Brandon* v. *United States,* 282 F.2d 607 (10th Cir.); *United States* v. *Gallo,* 123 F.2d 229 (2d Cir.); *United States* v. *Russo,* 250 F.Supp. 55 (E.D. Pa.).

> "To hold that recording by the company of the fact of a call between two of its telephones is an unauthorized interception of a communication would require a construction of the statute extending it beyond either its purpose or its words. The statute was not intended to proscribe long-standing reasonable business practices of communication companies. When a person takes up a telephone he knows that the company will make, or may make, some kind of a record of the event, and he must be deemed to consent to whatever record the business convenience of the company requires. If by any stretch of language the making of such a record could be termed an 'interception' of the communication, it is one which the sender has authorized. Hence it is not within the ban of the statute." *United States* v. *Gallo,* 123 F.2d 229, 231 (2d Cir.).

We find nothing in the language or legislative history of 47 U.S.C. § 605 indicating any congressional purpose

to preclude the telephone company from making records of long distance toll calls.

Therefore we hold that the maintenance of toll records in the routine course of business does not constitute "interception" of wire communications in violation of § 605 and is not wiretapping.

B.

Having held that the maintenance of the toll records and the making of the records does not constitute an "interception" forbidden by § 605, we now deal with the appellants' contention that the submission of the records to the IRS was a "divulgence" forbidden by § 605.

Only the first clause of 47 U.S.C. § 605 could be construed as prohibiting the telephone company from turning its records over to the Government since there was no interception of a message in violation of section 605's later clauses. The clause is as follows:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication my be passed, or to

> the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or *on demand of other lawful authority;* . . . ." (Emphasis supplied).

The Government maintains that the IRS summons was issued under 26 U.S.C. § 7602 and constituted "other lawful authority" for the divulgence of the toll records revealing the existence of the telephone calls. In an addendum to his findings of fact and conclusions of law on the defendants' suppression motions prior to the trial the District Judge held that the obtaining of the toll slips under the summons was obtaining them under "other lawful authority" within the meaning of section 605. Implicit in that holding is a finding that obtaining evidence for a criminal prosecution was not the sole purpose of the investigation. We find no evidence in the record to support a contention that this finding is in error. The appellants have not pointed out to this Court or to the District Court any evidence that the issuance of the summons testified as a witness at the summons were improper. The agent who authorized the suppression hearing, but on cross examination the appellants did not even undertake to develop any facts to show that the summonses were issued for an unlawful purpose.

Where the investigation may produce both civil and criminal evidence, the summons under section 7602 is a proper device for obtaining records. See *United States* v. *Powell,* 379 U.S. 48; *Ryan* v. *United States,* 379 U.S. 61, aff'g 320 F.2d 500 (6th Cir.). The burden is on the party objecting to the summons to show that it was used for an unlawful purpose. See *United States* v.

Powell, supra at 58; *United States* v. *Nunnally*, 278 F. Supp. 843 (D.C. Tenn.). That burden is not met by merely showing that the agent issuing the summons is a special agent of the IRS. See *Powell* v. *United States, supra*, (summons to appear before special agent); *Tillotson, Special Agent, IRS* v. *Boughner*, 225 F.Supp. 45, motion denied, 327 F.2d 982, aff'd 333 F.2d 515 (7th Cir.), cert. denied, 379 U.S. 913 (Special Agent summons with unknown taxpayer); *Mullins, Special Agent, IRS* v. *Angiulo*, 227 F.Supp. 524, aff'd 338 F.2d 820 (1st Cir.), cert. denied, 380 U.S. 963 (Special Agent summons). But see *United States* v. *Kleckner*, 273 F.Supp. 251 (S.D. Ohio), appeal dismissed on motion of appellants, 382 F.2d 1022.

It should be remembered that when the earlier summons was issued the IRS had no knowledge that Deming or DiPiazza were involved. The first name disclosed in the investigation was that of Harry Acker, who was listed as the subscriber of the Woodford Road telephone number with which the investigation was begun. At the time this summons was issued IRS could not have known what kind of violations would be disclosed by the investigation. There was a possibility that there would be a finding of civil tax liability.

In our view the record establishes that the telephone company divulged its records to IRS in response to a demand of lawful authority as expressly authorized by 47 U.S.C. § 605. The summonses were issued in conformity with and pursuant to the authority of 26 U.S.C. § 7602. A finding that the furnishing of the toll records for Deming's telephones at Woodford Road and at his

residence at Fort Thomas constituted a violation of 47 U.S.C. § 605 cannot be supported on this record.

In our opinion the decision in *United States* v. *Caplan*, 255 F.Supp. 805 (E.D. Mich.), relied upon by appellants, is distinguishable from the present case in at least two particulars: (1) that case involved the use of an unauthorized pen register, which, unlike making long distance toll records, is not an activity of the telephone company consented to by the subscriber and (2) the District Judge in that case found as a fact that the IRS summons was issued to investigate possible criminal violations and not to determine civil liability. In the present cases District Judge Porter, in the addendum to his findings of facts and conclusions of law on the motion to suppress, affirmatively found that the obtaining of the long distance toll slips in response to IRS summons was pursuant to "demand of lawful authority" as that phrase is used in 47 U.S.C. § 605.

C.

The appellants contend that the toll records could only be obtained under a search warrant, citing *Katz* v. *United States*, 389 U.S. 347, and *Hanna* v. *United States*, 393 F.2d 700 (5th Cir.). We find this contention without merit. *Katz* was an electronic surveillance case in which the Government eaves-dropped on telephone conversations. The Court said, "One who occupies [a telephone booth] ..., shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." 389 U.S. at 352. He is not entitled to assume that the fact that he

is making a call will be a secret. Similarly one who uses a telephone to make long distance calls is not entitled to assume that the telephone company will require a warrant before submitting its records in response to an IRS summons.

The Supreme Court recently held that *Katz* v. *United States* is "to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967." *Desist* v. *United States,* 394 U.S. 244, 254. Any eavesdropping in the present cases occurred well before that date.

Hanna v. *United States, supra,* was a case of wiretapping by the telephone company and, although the appellants did not mention it in their briefs, was written in three opinions including a dissent. The same panel reversed itself in a unanimous opinion at 404 F.2d 405.

We find no Fourth Amendment right of the appellants violated in the summoning of the toll records.

We hold that the toll records were properly obtained by the Government and were usable both as a basis for the search warrants and as evidence at trial against the appellants.

2) Sufficiency of the search warrants

Appellant Deming challenges the search warrants on the grounds that they are invalid under *Spinelli* v. *United States,* 393 U.S. 410, and *Aguilar* v. *Texas,* 378 U.S. 108; that they are supported by differing statements; and that there is a discrepancy between a date alleged

in the statements and what was subsequently proved by the evidence. We find that the warrants were issued on a showing of probable cause and were in no way defective. The statement which is challenged recites the qualifications of the Special Agent making the statement and then recites the following facts on which probable cause was found by the District Court: The Cincinnati office of the IRS was informed in February 1966 (the date is discussed below) that suspected bookmakers in Las Vegas, Nevada were calling a Cincinnati telephone number. The Cincinnati IRS determined the name of the subscriber to the number and examined the toll records discussed above. In June 1966 the affiant was informed by another named Special Agent that a third named Special Agent had been making bets with a person in Lexington, Kentucky by calling two numbers there. Calls had been placed from the Lexington numbers to the Cincinnati number. Calls had also been placed between the Cincinnati number and that of Sam DiPiazza, who was a nationally known bookmaker, and that of an address in Louisville, Kentucky, for which a federal wagering stamp had been issued. The affiant concluded that these telephone calls, in his judgment as an experienced investigator, showed a pattern of a bookmaking operation at the Cincinnati number on Woodford Road.

The statement further recited that the Woodford Road building had been put under surveillance and that a certain automobile, registered to Deming's mother at Deming's address in Fort Thomas, Kentucky, had been observed on eight occasions outside the building and Deming had been observed driving it. Deming was known to the affiant as a bookmaker and had been

arrested for wagering law violations and had at one time had a wagering stamp. The toll records revealed a number of calls from Deming's home number to the two Lexington numbers at which the Special Agent had placed wagers.

Deming urges that this Court hold that there was not probable cause because the statement did not recite the name of the informer who told the IRS in Cincinnati in early 1966 that gamblers were calling the Cincinnati number.

In both *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *United States*, 393 U.S. 410, the informant's information was central to the finding of probable cause. In the present case the information from the unknown informant could have been left out of the statement altogether without affecting the determination of probable cause. The information from the informant here was merely the tip which first aroused the curiosity of the IRS. The investigation did not really begin until the Cincinnati number was tied in with the telephone numbers in Lexington used by the person with whom the Special Agent was placing wagers.

Spinelli is no authority for the proposition that the search warrant is invalid because an investigation is begun as a result of a tip. Weak, anonymous and even untrustworthy information may serve as the opening clue to uncovering criminal acts. The District Judge was correct when he stated in the course of the proceedings on the motion to suppress, that: 'They can get a lead in any way [so long as it is not illegal]; and if it is followed by investigation which turns up all

kinds of probable cause for such as there was in this affidavit . . . it will support a judicial finding of probable cause."

In the case of *United States* v. *Nicholson*, 303 F.2d 330 (6th Cir.), cert. denied 371 U.S. 823, where this Court was faced with affidavits alleging facts similar to those in this case, we held:

> "Probable cause exists where the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Brinegar v. United States, supra, 338 U.S. 175-176, 69 S.Ct. 1302; Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327. Whether probable cause exists requires an act of judgment formed in the light of the particular situation and with account taken of all the circumstances. Because many situations are more or less ambiguous, a determination that probable cause exists should be accepted by this Court unless it is shown that the Commissioner's judgment was arbitrarily exercised. Brinegar v. United States, supra, 338 U.S. 176, 69 S.Ct. 1302; Merritt v. United States, 249 F.2d 19, 20, C.A. 6th." 303 F.2d at 332.

We hold that probable cause under this standard was established by the factual allegations of the statements in the affidavits.

Appellant Deming complains that the statements in support of the five search warrants were not identical, that the District Court upheld the warrants on the basis of the affidavit which contained additional allegations, and that without the additional allegations there is no showing of probable cause.

The affidavits are identical except that some additional allegations appear in some of them. In our discussion above we have dealt with the most limited of the affidavits. The additional statements enhance the showing of probable cause but are not necessary to establish it.

In *United States* v. *Nolan*, ____ F.2d ____ (No. 18,580, July 15, 1969, 6th Cir.), this Court said:

> "We believe that consistent with the Fourth Amendment the facts supplied the Commissioner by both affidavits could be taken into account by him in determining probable cause in relation to each."

The District Court was well aware of the differences in the affidavits and did not make its decision on the basis of the fullest alone. We concur with the conclusion of the District Court that probable cause was shown in all of the affidavits.

Appellant places emphasis upon a small variation in dates between the affidavits and proof. The affidavits state that the information first was received from Las Vegas in February 1966. The evidence indicates that the Las Vegas IRS office requested in January 1966 that the telephone at 3808 Woodford Road be checked. The

District Judge made no specific finding as to the date the information first was received by the Cincinnati Office from Las Vegas. In his findings of fact on the motion to suppress, he said:

> "An IRS intelligence agent in Las Vegas had a suspected bookmaker under eyeball surveillance, observing him to make a number of calls from a certain phone, obtained the records regarding such calls from the telephone company, discovered one to be Cincinnati 791-4793, listed under the name of Harry Acker, 3808 Woodford Road, Silverton, Ohio.
>
> "Investigation followed, and the case was put on the shelf until June, 1966, when it was reopened when an IRS agent from Louisville, Kentucky, advised the Cincinnati Office that the same number was being called by Lexington telephone numbers under surveillance.
>
> "Investigation and eyeball surveillance followed ...."

We find no possible prejudice to appellants growing out of the conflict in dates as between January and February 1966. This variation could not be construed to constitute reversible error.

We hold that the warrants were based on probable cause and that the material seized under them was admissible in evidence.

3) Electronic surveillance

Appellant DiPiazza frames the question with respect to electronic surveillance as:

"Did The Judge Deny To The Accused An Open Court Determination Of The Nature And Admissibility Of 'Findings' And 'Conclusions' Resulting From Some Ninety Hours Of Illegal Electronic Eavesdropping?"

We holdr that DiPiazza had the opportunity to show infirmities in the Government's case resulting from electronic surveillance and that none was revealed.

A thorough pre-trial evidentiary hearing was conducted by the District Judge on defendant's motion to suppress. There was no evidence of any electronic surveillance of Deming or his telephones at the 3808 Woodford Road address or his residence at Fort Thomas. The United States filed notice, prior to the hearing, that DiPiazza had been subjected to electronic surveillance in the past and produced 35 tapes for inspection of counsel for defendants. Defendants introduced fives tapes into the record. The District Court made a finding of fact that there was no connection between the earlier electronic surveillance of DiPiazza and the investigation which led up to the indictment in the present case.

After the trial a hearing was held on the problem of electronic surveillance on the appellants' petition and motion to suppress. No evidence was taken and none was offered. Counsel argued evidence which was al-

ready before the Court and declined to bring on either new witnesses or othewise to show taint in the Governstrate taint. See *Alderman* v. *United States,* 394 U.S. 165, 183; *Nardone* v. *United States,* 308 U.S. 338, 341.

Thus the defendants were afforded an opportunity both before and after trial to show any taint of the Government's case, including the search warrants, by electronic surveillance. The Government demonstrated the basis of its case to be independent of electronic surveillance. The appellants failed to demonstrate taint. See *Alderman v. United States,* 394 U.S. 165, 183;*Nardone v. United States,* 308 U.S. 338, 341.

We hold that the District Court did not deny the appellants any opportunity for a hearing to which they were entitled with respect to the question of surveillance of an illegal nature.

4) Marchetti and Grosso

Deming urges that *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, require the exclusion of the evidence against him which was seized under the search warrants, because he was initially charged in an information with violation of the wagering tax laws by willful failure to pay the tax imposed by 26 U.S.C. § 4411. Subsequent to the return of the indictment on which Deming and DiPiazza were tried, the information was abandoned.

Marchetti and *Grosso,* decided after Deming's trial do not hold that the wagering laws are unconstitutional.

United States v. *One 1965 Buick*, 392 F.2d 672 (6th Cir.), petition for cert. filed, 37 U.S.L.W. 3221 (No. 619). They hold that if a criminal defendant charged with violating the wagering laws properly asserts his privilege against self-incrimination, the Fifth Amendment is a bar to the criminal prosecution. Thus, Deming could have pled the Fifth Amendment in bar of prosecution for the wagering tax violation. It does not follow that the evidence seized under the warrants must be excluded since the warrants were proper authority for the searches at the time they were issued and executed. *Washington* v. *United States*, 402 F.2d 3 (4th Cir.), petition for cert. filed, 37 U.S.L.W. 3287 (No. 831). Since the evidence was obtained under valid search warrants, there was no basis for excluding it. This conclusion also disposes of Deming's claim that he was improperly denied a hearing on a suppression motion prior to the indictment — he cannot have been prejudiced by not having a hearing at which he could not have prevailed in his motion.

We intimate no opinion on whether warrants issued after *Marchetti* and *Grosso* for wagering tax violations are valid. We hold only that *Marchetti* and *Grosso* do not require the exclusion of evidence seized prior to the decisions in those cases under otherwise valid search warrants when the evidence is introduced to show the commission of crimes other than wagering tax violations.

Other contentions made by the appellants have been considered, and we are of the opinion that they are without merit. The District Court made no error in overruling the various motions to suppress.

Affirmed.

CELEBREZZE, Circuit Judge, dissenting. I respectfully dissent. I agree with the majority that telephone company toll records containing an individual's long distance calls are protected by § 605 of the Communications Act. The principal issue before us is whether the Government violated that section by using the § 7602 summons to obtain the telephone records that led ultimately to Appellants' convictions. If the Government did violate § 605 there was no probable cause for the search warrants. *Spinelli* v. *United States,* 393 U.S. 410 (1969). Without the toll records, the Government could not establish that a bookmaking network existed between Deming's telephones, DiPiazza's New Orleans telephone, and the two telephones in Lexington, Kentucky.[1] Stripped of this information, the only evidence

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[1]I.R.S. agents also summoned toll records for telephone numbers found in Deming's telephone records, including those for two telephone numbers used by Kuhn. Kuhn was indicted along with Appellants as a co-conspirator and convicted largely on the basis of the evidence seized in the raids on Deming's premises. This Court today affirmed his conviction, No. 19,030. Kuhn's telephone numbers were the Lexington, Kentucky telephone numbers named in the affidavits supporting the search warrants. The toll records for his numbers showed a high volume of calls to Deming's telephone numbers. Appendix, pp. 155 and 157. The toll records, which were summoned well before June of 1966, established the bookmak-

the Government had when it went before the Commissioners was an unsupported tip from Las Vegas, Nevada, and visual surveillance which disclosed nothing more than the fact that Deming was seen near the Woodford Road apartment. The U.S. Supreme Court held in *Spinelli* that such circumstances do not establish probable cause.

I cannot agree with the majority's conclusion that the Internal Revenue summons that were used to obtain the toll slips were "other lawful authority" within the purview of § 605. I am of the opinion that the record clearly establishes that Government agents used the summons for the sole purpose of procuring evidence to prosecute and convict Appellants of conspiracy to violate, and of violating federal criminal statutes. This is contrary to the U.S. Supreme Court's holding in *Reisman* v. *Caplin*, 375 U.S. 440 (1964), where the Court said that the Government could not use the § 7602 summons for that purpose.

When the Government conducts searches for evidence of crime it must proceed by lawful authority. No less is required under § 605 which embodies a congressional mandate that the privacy of telephone users shall be free from arbitrary invasion by government officials. Consequently, the U.S. Supreme Court has held that when such an invasion does take place evidence

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ing network alleged in the affidavits| Assuming that an I.R.S. agent did place bets with parties at the Lextington, Kentucky telephone numbers in uJne of 1966 as alleged in the affidavits, it was not because of his own independent investigation but because of the information contained in the toll records.

seized as a result may not be used in a criminal prosecution against the parties to the communication, in these cases, Deming and DiPiazza.[2] These holdings accord with the rule excluding evidence seized in violation of the Fourth Amendment, to which § 605 has often been equated.[3]

The record in these cases establishes that Government agents obtained the evidence which led to Appellants' indictments and convictions through an indiscriminate abuse of civil process, the § 7602 summons.

The majority opinion states that "[t]he F.B.I. raided DiPiazza's hotel room in New Orleans on January 8, 1966, which was well within the period charged in the indictment." It is important to note that the F.B.I. raided DiPiazza's hotel room one month before the Government received its alleged Las Vegas information concerning Deming's Woodford Road telephone number. It is also important to note that the Government admitted during the hearing on the motion to suppress that electronic surveillance had been conducted against DiPiazza by both the F.B.I., which arrested DiPiazza, and the I.R.S., which arrested Deming, his co-conspirator.

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[2]And Kuhn in No. 19030, *Nardone* v. *United States*, 302 U.S. 379 (1937); on second appeal, 308 U.S. 338 (1939); *Goldstein* v. *United States*, 316 U.S. 114 (1942). The term "sender" has been held to include both parties to the telephone conversation. *United States* v. *Tane*, 329 F.2d 848 (2d Cir. 1964); see *Rathburn* v. *United States*, 355 U.S. 107, 113 (1957) (Dissenting opinion of Frankfurter, J.).

[3]*Goldstein* v. *United States*, 316 U.S .114 (1942); see generally *Katz* v. *United States*, 389 U.S. 347 (1947).

Upon the arrest of DiPiazza on January 8, 1966, the F.B.I. obtained from his person papers containing Deming's Woodford Road telephone number. Although the I.R.S. informed the Commissioners that it summoned Deming's telephone toll records (Woodford Road) in February of 1966, supposedly at the request of its Las Vegas office, evidence devcloped that these toll records were summoned in January of 1966. The chronology of events in these cases emerges as follows: The F.B.I. and the I.R.S. electronically monitored DiPiazza's conversations; F.B.I. agents raided DiPiazza's hotel room in January of 1966 and seized Deming's Cincinnati, Ohio telephone number; I.R.S. agents summoned the toll records for that number in the same month, procured search warrants on the basis of the information contained in them, and seized the evidence that led to Appellants' convictions for violating wagering statutes and for conspiring to do so.

In overruling Appellants' motions to suppress, the District Judge found that the joint F.B.I. - I.R.S. electronic surveillance did not lead to the indictments against them. He found that the Las Vegas information did. Although some argument during the hearing on the motion to suppress was devoted to the use of the § 7602 summons in obtaining the toll records, the Government did not at any time allege that the investigation conducted by its agents had civil tax ramifications.

Coming to the propriety of the Government's use of the § 7602 summons, even if we assume that the joint electronic surveillance did not lead the Government to the evidence used to convict Appellants, which is, I believe, a highly questionable assumption, it is abund-

antly clear that the F.B.I. and the I.R.S. were not interested in Appellant's civil federal income tax liability. Special I.R.S. agent Wetherill, who obtained the search warrants, revealed as much during the hearing on the motion to suppress. In the colloquy that follows, Appellant's counsel was attempting to ascertain from Wetherill how he knew that DiPiazza was a "nationally known bookmaker" as he had alleged in the affidavits supporting the search warrants:

"Q. Now, again I ask you what makes a suspected bookmaker.

A. Suspected bookmaker is a person that I believe to be engaged as a bookmaker.

Q. But who does not have a stamp, does not pay an excise tax and who has not been convicted; is that correct?

A. Yes, sir.

Q. Now, explain to me why you refer to Sam DiPiazza, who has not been arrested, not been convicted and who has never had a stamp as a nationally known bookmaker? Look at your affidavit and tell me why you made such a statement.

Mr. Michael: I object to one part of the question if it said he has never been arrested. We have information to the contrary.

Mr. Johnson: May I rephrase the question, I didn't mean to say arrested.

The Court: Forget the arrested.

Q. Do you know whether or not he has ever had a stamp?

A. No, sir.

Q. Have you ever checked it?

A. No, sir.

Q. Do you know whether or not he has ever paid excise tax?

A. No, sir.

Q. Have you ever checked it?

A. No, sir.

Q. Have you ever checked whether he has ever been convicted?

A. No, sir.

Q. However, you swear he is a nationally known bookmaker?

A. For the years I have been in the Service, for these years I have been in the Service I have heard and been told that Sam DiPiazza is a bookmaker."[4]

But there is more than the subjective intent of the agents in these cases to show that this was from start to finish a criminal investigation. The I.R.S. Special Agent, like Wetherill and all of the agents who participated in these cases, does not assess civil tax liability. He, like his agent colleague in the F.B.I., has a far more grave responsibility:

> "A special agent is a criminal law enforcement officer, and just like any state or municipal detective or policeman." N.Y.U. 20th Inst. on Fed. Tax 1081, 1087 (1962).

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[4]As the Supreme Court said in *Spinelli* v. *United States*, 393 U.S. 410, 418-419 (1969), "a simple assertion of police suspicion" that someone "was known . . . as a gambler" may not provide a basis for a finding of probable cause for a search warrant nor "be used to give additional weight to allegations that would otherwise be insufficient". See *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

Congress has authorized the Commissioner of Internal Revenue to investigate both civil and criminal offenses against the revenue. The first of these functions is carried out by the revenue agent who is usually assigned to the Service's Audit Division. His job is to see that taxpayers accurately report their income and pay the tax owing on it. The special agent, on the other hand, is assigned to the Service's Intelligence Division. His function, as stated above, is to investigate criminal offenses against the revenue. *Wild* v. *United States*, 362 F.2d 206 (4th Cir. 1966). When a taxpayer may be subject to increased liability for taxes as well as criminal penalties, the revenue agent and the special agent will work together in a joint investigation. Thus, for example, where a revenue agent suspects fraud on the part of a taxpayer that would deprive the Government of tax dollars and possibly subject the taxpayer to criminal penalties, he will call in the special agent:

> "When a Special agent enters the picture, it is an entirely new investigation, for a new purpose, and the civil tax liability is no longer involved." NYU. 20th Inst. on Fed. Tax 1081, 1087 (1962).

As mentioned above, no Revenue agent ever took part in the Government's investigation. The summoning of the telephone records, the stakeout of the Woodford Road apartment, and the seizure of all the evidence against Appellants was handled by special agents of the Internal Revenue Service whose function it is to "investigate criminal offenses against the revenue." This takes on crucial significance in light of the Supreme Court's holding that a summons authorized un-

der 26 U.S.C. § 7602 cannot be used where the I.R.S. has for its purpose the obtaining of evidence for use in a criminal prosecution. *Reisman* v. *Caplin*, 375 U.S. 440 (1964); see *Boren* v. *Tucker*, 239 F.2d 767 (2d Cir. 1956); *United States* v. *DeGrosa*, 405 F.2d 926 (3d Cir. 1969); *United States* v. *Caplin*, 255 F.Supp. 805 (E.D. Mich. 1966).

I believe that the majority paints with too broad a brush when it says that the courts will grant enforcement to the § 7602 summons "[w]here the investigation may produce both civil and criminal evidence." The cases that the majority cite in support of that statement, namely, *United States* v. *Powell*, 379 U.S. 48 (1964), and *Ryan* v. *United States*, 379 U.S. 61 (1964), say that the Commissioner must show that the investigation is "pursuant and relevant to" a legitimate purpose, which is, in the language of § 7602:

> "[To] ascertain the correctness of any return where none has been made, determine the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability...."

I submit that none of these purposes were present here. See *Boren* v. *Tucker*, 239 F.2d 767 (9th Cir. 1956).

While courts have granted enforcement to the § 7602 summons where the investigation might lead to a criminal prosecution the trust, purpose and scope of the investigation at the outset was to determine the liability

of the taxpayer for taxes owed to the Government. *United States* v. *Kleckner*, 273 F.Supp. 251 (S.D. Ohio, 1967), appeal dismissed, 382 F.2d 1022 (6th Cir. 1967).

It is a far different thing to say as the majority does in defense of the summons issued in these cases that there was "a possibility that there would be a finding of civil tax liability." We have a deep and fundamental tradition in this country given force through our Constitution that prevents Government agents from rummaging at will into the private lives of citizens with the expectation that something useful may turn up. Accordingly, I cannot condone the sweeping use of the § 7602 summons in these cases which enabled the I.R.S. to seize knowledge of Appellants' telephone conversations. I do not believe that the executive branch of our government is entitled to wield such power, nor can I excuse its exercise here on the ground that Government agents believed that the rewards flowing from their actions would more than justify their unfettered intrusion into Appellants' private lives.

While I am in accord with the ultimate goal of law enforcement agencies in stamping out organized crime in this country, these agencies must nevertheless proceed in a manner consistent with existing court decisions, congressional mandate, and constitutional limitations. It is my opinion that they have failed to do this.

Since it is my belief that the sole purpose of the investigation in these cases was to gather evidence for use against Appellants in a criminal prosecution, I submit that the § 7602 summons were not "other lawful

authority" within the meaning of § 605 of the Communications Act. Accordingly, the information found in the toll slips could not be disclosed to the Commissioners. 47 U.S.C. § 605; *Alderman* v. *United States*, 394 U.S. 165 (1969). Without this information, the Government could not meet the standards for probable cause established in *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *Aquilar* v. *Texas*, 378 U.S. 108 (1964).

I would therefore reverse.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18,593

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

SAM (SALVATORE) DI PIAZZA,
Defendant-Appellant.

BEFORE: PHILLIPS and CELEBREZZE, Circuit Judges and McALLISTER, Senior Circuit Judge.

APPEAL from the United States District Court for the Southern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in thise cause be and the same is hereby affirmed.

No costs awarded. Rule 39(b).

Entered by order of the Court.

(Signed) CARL W. REUSS

_____

Clerk

A True Copy.
Attest:

_____

Carl W. Reuss, Clerk

Issued as Mandate:
COSTS: NONE
Filing fee ..... $----
Printing ..... $----

Total ..... $----

APPENDIX C

(COURT EX. #2)

February 21, 1967

Mr. Robert Spatz
Staff Assistant to Chief Counsel
Intelligence Division
CP: I

Analysis of Information on Electronic Surveillance
The Acting Attorney General
Director, FBI

DEPARTMENT OF JUSTICE
REQUESTS, ELECTRONIC
SURVEILLANCE CHECKS

In reply to the request forwarded by memorandum of Assistant Attorney General Fred M. Vinson, Jr., dated February 3, 1967, the following listed individuals have not been the direct subjects of electronic surveillances, nor present at, nor participants in conversations overheard by any electronic device:

Herschel "Huck" Turner
Otto Kuhn
Tim Hall
Jerry Dunlevy
Lawrence Kern
Ray Robbins
Joe Polio

"Sam (Salvatore) DiPiazza, mentioned in referenced memorandum, was not a subject of electronic surveillance. His conversation was monitored, however, in

connection with an electronic eavesdropping surveillance on rooms utilized by Eugene Anthony Nolan at the Hilton Inn Hotel, Kenner, Louisiana, May 22, 1964, to May 25, 1964. All material, including logs, pertinent to the present inquiry on DiPiazza, was furnished to the Department by memoranda dated December 16, 1966, and January 4, 1967, captioned "Eugene Anthony Nolan; Interstate Gambling Activities."

It is suggested that you determine whether any other Federal investigative agency has conducted any electronic surveillance of above-mentioned individuals.

1 — The Deputy Attorney General
1 — Mr. Fred M. Vinson, Jr.
Assistant Attorney General

APPENDIX D

(COURT EX. #3)

New Orleans, Louisiana

Basis for Check:

In a letter of February 6, 1967, the Assistant Attorney General for the Criminal Division, requested information relating to electronic surveillance of the above-named individual.

Source of Information:

Special Agent Fred G. Carrington and 16 other agents, who participated in the investigation (Case No. 31-73-

031-4-3), referred to in the Department of Justice letter, have submitted Questionnaires, the originals of which are attached.

Summary of Information Regarding Electronic Surveillance:

The previous investigations of DiPiazza are summarized in this report so you will be fully aware of all electronic surveillance of this taxpayer.

Operation Freeload and Sam DiPiazza, Case No. 60-NO-385-RFO, a related investigation, were initiated because a confidential informant alleged that DiPiazza and others were engaged in illegal bookmaking operations; and that they were doing business with other bookmakers and gamblers in various parts of the United States. It was further alleged that Sam DiPiazza and his associates were making long distance telephone calls without paying for the telephone service.

In January 1958, the F.B.I. informed the Internal Revenue Service that the Southern Bell Telephone and Telegraph Company of New Orleans, Louisiana, had been monitoring certain telephones in the New Orleans area. It was later disclosed that the telephone company had monitored and recorded conversations between their employees and alleged bookmakers without the knowledge or consent of either party.

In March 1959, at the request of Special Agent Naurbon Perry, the Southern Bell Telephone and Telegraph Company installed a wiretap on WH (Whitehall) 7-0611, the number of Sidney Wyman, an associate of

Albert E. Bagneris. Telephone calls were either placed or received by Sam DiPiazza, Charles A. Perez and Anthony Aiola at this number. Perry stated he monitored this wiretap for three days in March 1959.

In May 1959, a Canadian telephone company installed a wiretap, monitored and recorded the conversations of DiPiazza and others, without the consent of the parties to the conversations, to ascertain if their employees were still furnishing free telephone service to these individuals. The General Counsel for the Canadian telephone company provided tapes of these telephone company wiretaps to Special Agent Perry. Perry listened to these tapes and recorded phone numbers, codes and cities of suspected gamblers. He disseminated this information to a number of districts for their information and for collateral investigations. Collateral replies disclosed that telephones listed under the numbers furnished by Perry were being used by suspected gamblers.

In March 1961, Edward Banas and Owen B. Yung, National Office Intelligence Division Coordinators, with a contact microphone in an adjoining hotel room, monitored and recorded certain conversations of two Government witnesses without their knowledge or consent.

Also in 1961, Special Agents installed a microphone in a room at the Federal Office Building occupied by attorneys from the Department of Justice. This installation was made at the request of these attorneys and the recorder was placed in an adjoining room. It is reported that the microphone was never used.

Transcripts made of conversations overheard, as a result of the above referred to electronic surveillance incidents, were submitted to the U.S. Attorney. Thirteen defendants, including Sam DiPiazza were indicated in Operation Freeload. The attorneys for these defendants attempted to show that the monitoring by Special Agent Perry tainted each of their clients' cases.

In 1963, Judge Herbert W. Christenberry ruled that the evidence produced, including the transcripts of Perry's recordings, did not show that any of the information from the monitoring was used to develop the case of Sam DiPiazza, et al, SI-60-NO-385-RFO, a/k/a United States v Benjamin Lassoff, et al. Nine of the defendants indicted in Operation Freeload were acquitted by a petit jury, three entered pleas of guilty and Sam DiPiazza's case was severed. Sam DiPiazza's case was never tried.

In a subsequent investigation of DiPiazza, Case No. 72-51-001-5-3, Special Agent Eugene A. Esparros reported that on June 23, 1964, with the assistance of two investigators (Howard Vedrine and Louis Cerda) of the Alcohol and Tobacco Tax Division, he set up an electronic listening device in Room 1226, Roosevelt Hotel, New Orleans, Louisiana. Rooms 1222 and 1224 were being rented by a Mike Green; however, the rooms were being used by Sam DiPiazza, Dominick "Buck" Diaz, Eugene A. Nolan and Joseph "Papa Joe" Baragona, well-known gamblers.

Special Agent Esparros reported:

"Between the walls of Room 1225 and 1226 was an air space of approximately three or four inches, through which air-conditioning and heat ducts, electrical conduits, and water pipes were run. By removing the electronic outlet plate at the baseboard of the wall in Room 1226, a cardboard cone was inserted and through this cone a very sensitive microphone was inserted. This microphone was borrowed from the Customs Service. From this microphone a wire was run to a Wollensak type recorder which acted as an amplifier and from the tape recorder a set of earphones was inserted. By use of this makeshift device, a conversation could be recorded on the tape recorder or heard through the earphones, but not simultaneously. When installing this microphone device, special care was taken that no air-conditioning or heating ducts, electrical conduits, or water pipes were intercepted; and it is positively stated that this cone and microphone did not protrude into Room 1224, or even pass the air-conditioning or heating ducts, electrical conduits, and water pipes between the walls. This device was installed each morning from June 22, 1964, through June 29, 1964, by various investigators of the Alcohol and Tobacco Tax Division or by me. Each night this device was removed and taken back to the office."

Special Agent Esparros reported that no evidence of any kind was accrued from this listening device.

Former Special Agent Ernest E. Hartenstine reported in a memorandum dated January 10, 1967;

"On July 7, 1964, Special Agent Percy F. Berniard and I, while engaged in an investigation of Eugene A. Nolan, 72-51-003-5-3, Salvatore "Sam" DiPiazza, 72-51-001-5-3, and Dominick "Buck" Diaz, 72-51-002-5-3, obtained permission from Vincent Rizzo, Manager, Fontainebleau Motor Hotel, New Orleans, Louisiana, to occupy Apartment 3-D, at the motel. This apartment has a wall in common with Apartment 3-C, in which we believed Nolan, DiPiazza, and Diaz were operating a handbook.

Special Agent Berniard and I installed a microphone in an electrical outlet located in Apartment 3-D on the side of the wall in common and attached the microphone to a tape recorder. On July 8, 1964, we attempted to record conversations emanating from Apartment 3-C; however, due to the thickness of the wall and surrounding noise, the tapes were poor and the conversations were hardly audible. The microphone and recorder were left in Apartment 3-D and on July 9, 1964, I obtained a search warrant, based on visual surveillance, and led the raid on Apartment 3-C. Upon gaining entrance to Apartment 3-C, I found a full-scale handbook in operation. I arrested Nolan, DiPiazza and Diaz in the apartment.

During the time the raid was in progress, Agent Berniard recorded the activities of the raid on the tape recorder. The tapes from Apartment 3-D are stored in the office of the Chief, Intelligence Division, New Orleans, Louisiana."

Charges are pending in the Eastern District of Louisiana against DiPiazza and Diaz for wilful failure to pay the special tax and to register prior to engaging in the business of accepting wagers.

There is no apparent connection between the current case in Cincinnati (31-73-031-4-3) and the case investigated in Louisiana (SI-60-NO-385-RFO and 72-51-001-5-3).

In connection with the current investigation, Special Agent Harold Scyller reported that on January 9, 1967, Edward Joyce, Attorney, Organized Crime and Racketeering Section, Department of Justice, made the statement that agents of the Federal Bureau of Investigation had used a wiretap on a telephone used by DiPiazza, Scyller has no further information concerning this wiretap.

Conclusion:

There is no indication that any employee of the Internal Revenue Service used any electronic surveillance concerning the current case on DiPiazza (31-73-031-4-3), nor is there any indication that any leads were used in the current case based on the use of electronic surveillance in the prior investigations.

W. A. KOLAR
Director

Enclosure: Questionnaires 17
cc: Mr. Norman Fox

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 960

SAM (SALVATORE) DI PIAZZA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 965

WILLIAM CLYDE DEMING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. No. 960, 14–42; Pet. App. No. 965, 26–28) are reported at 415 F. 2d 99 and 415 F. 2d 111.

JURISDICTION

The judgments of the court of appeals were entered on September 11, 1969. Petitions for rehearing were denied on November 18, 1969. The petition for a writ

of certiorari in No. 960 was filed on December 17, 1969, and in No. 965 on December 18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the holdings in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, require the exclusion of evidence seized prior to the date of those decisions under search warrants based on affidavits asserting violations of both the federal wagering tax laws and 18 U.S.C. 1952, which prohibits the use of interstate facilities in aid of illegal gambling activities (No. 965).

2. Whether the affidavits supporting the search warrants provided sufficient probable cause for their issuance (No. 965).

3. Whether Section 605 of the Federal Communications Act of 1934 prohibits the telephone company from disclosing toll records of long distance calls to the Internal Revenue Service in response to a summons issued under 26 U.S.C. 7602 (Nos. 960, 965).

STATEMENT

In an indictment returned in the United States District Court for the Southern District of Ohio, petitioners, together with one Otto Kuhn (petitioner in No. 1096 Misc., this Term) were charged with the use of interstate facilities to promote an illegal gambling enterprise and with conspiracy, in violation of 18 U.S.C. 371 and 1952. On motion, the case was severed for trial. Petitioners Di Piazza and Deming were convicted by one jury on seven substantive counts and on one con-

spiracy count, and were sentenced to a total of ten years' imprisonment and fined $50,000. Deming was also convicted along with Kuhn by a second jury on five substantive counts and on a different conspiracy count. Deming was sentenced to a total of ten years' imprisonment and fined $5,000.

The evidence (the sufficiency of which is not challenged) at the separate trial of Di Piazza and Deming is set forth in the opinion below relating to that case (Pet. App. No. 960, 15–18; Pet. App. No. 965, 29–32). It showed a large-scale, interstate bookmaking operation, illegal in character, which in 1966 made extensive use of telephones. Di Piazza was based primarily in New Orleans; Deming at 4808 Woodford Road in Cincinnati as well as at his residence in Fort Thomas, Kentucky. As the opinion details, search warrants executed on July 22, 1966, at the Cincinnati address and at the Fort Thomas residence of Deming resulted in the seizure of gambling records and paraphernalia (Di Piazza Document App. 39a–43a, 45a–49a).[1]

Both affidavits to support the searches of the two premises occupied by Deming in Cincinnati and Fort Thomas were signed by an agent of the Internal Revenue Service and alleged violations of the federal wagering tax statute and 18 U.S.C. 1952, prohibiting the use of interstate facilities to promote an illegal gambling activity. The affidavit showed that in February 1966 the Cincinnati office of the IRS received

[1] "Di Piazza Document App." refers to a special appendix filed by petitioner Di Piazza in the court below containing what he termed "relevant documents"; a copy of this is on file with the Clerk of this Court.

information that suspected bookmakers in Las Vegas were calling Cincinnati telephone number 791–4793 listed to a "Harry Acker" at 3808 Woodford Road, and that in June 1966 a special agent had placed bets with a person at Lexington, Kentucky, telephone numbers 255–2592 and 255–7933. Toll call slips showed calls between the Woodford number and the Lexington numbers, between the Woodford number and a particular person having a wagering tax stamp in Louisville, and between the Woodford number and Sam Di Piazza who was described as a nationally known gambler. It was also alleged that William Clyde Deming, a person who in 1962 had a federal wagering tax stamp and had been arrested for wagering tax violations, was seen at the Woodford address on eight occasions; that toll records of Deming's home telephone between January 1966 and May 1966 showed 34 calls to the Lexington numbers; and that Deming had no current federal wagering tax stamp. One of the affidavits in addition stated that Deming had been convicted of federal wagering tax violations (Di Piazza Document App. 39a–43a, 45a–49a).[2]

The evidence at the separate trial of Deming and Kuhn also showed wide-scale, interstate gambling activity, similarly illegal in nature, with Deming operat-

[2] That affidavit also stated that an investigation had revealed that the Harry Acker telephone listing at Woodford Road was fictitious and that toll slips for the Woodford number between April and July 1966 showed over 350 telephone toll calls to known bookmakers and to persons suspected of being bookmakers.

ing in Cincinnati and Kuhn in Fort Thomas, Kentucky. In that case the government introduced evidence resulting from the same two search warrants and from a third warrant executed at the residence of Kuhn in Lexington. The search warrant for Kuhn's residence did not allege a violation of 18 U.S.C. 1952.

ARGUMENT

1. The affidavits supporting the two warrants to search the premises occupied by petitioner Deming contained facts showing violations of both the wagering tax provisions of the Internal Revenue Code and of 18 U.S.C. 1952, a separate statute forbidding the use of interstate facilities to carry on an illegal gambling business. These two warrants also specified that there was probable cause to believe that both of these statutory provisions had been and were being violated (Di Piazza Document App. 39a–49a). These warrants are, therefore, unlike the warrant issued to search the premises occupied by Deming's co-defendant Kuhn which resulted in the seizure of objects introduced at the Deming-Kuhn trial, since it referred only to wagering tax law violations.[3] Even if the reference to the federal wagering tax laws in the two Deming warrants would render them defective if that was the sole statutory violation upon which the warrants were based, the warrants involved here are supported by the alleged violation of 18 U.S.C. 1952.

[3] As to the third search warrant, involved in Kuhn's petition (No. 1096 Misc., this Term) and relating to Deming's separate conviction here, the government is suggesting that action be deferred pending decisions in various cases involving the retroactivity of *Marchetti* v. *United States*, 390 U.S. 39.

When an affidavit for a warrant contains both proper and improper grounds, it is sufficient if the proper grounds—here the use of interstate telephone to carry on unlawful gambling—are sufficient to support a finding of probable cause. See *Chin Kay* v. *United States*, 311 F. 2d 317, 321–322 (C.A. 9); *Silbert* v. *United States*, 282 F. Supp. 635, 644–645 (D. Md.); *United States* v. *Epstein*, 240 F. Supp. 80 (S.D.N.Y.).

2. As the court below properly held (Pet. App. No. 960, 24–27), the affidavits supporting the warrants were sufficient under the principles of *Spinelli* v. *United States*, 393 U.S. 410, and *Aguilar* v. *Texas*, 378 U.S. 108. See also *United States* v. *Ventresca*, 380 U.S. 102. The United States Commissioner was told that a government investigator had placed telephone bets with an individual who in turn was calling and was called from the telephone numbers of the two Deming premises which were raided. Added to this is the information that suspected Las Vegas bookmakers had called one of the Deming numbers, that Deming formerly had a wagering tax stamp and that there were toll calls between this Deming number and a holder of a current wagering tax stamp. Under these circumstances, the Commissioner could properly find probable cause to believe that petitioners were using interstate facilities in aid of gambling.

3. The examination of telephone company records by IRS agents under a summons issued under 26 U.S.C. 7602 during the investigation which led to the issuance of the search warrant did not violate the first clause of Section 605 of the Communications Act (47 U.S.C. (Supp. IV) 605). Section 7602 of the Internal Revenue Code authorizes the Treasury Department to

summon "any person having possession, custody, or care of books of account containing entries" relating to the tax liability of any person in order to make a tax return where none has been filed or to determine a possible tax liability. As pointed out in the government's memorandum opposing a rehearing in *Covello* v. *United States,* No. 240, this Term (a copy of which we are furnishing to counsel for petitioners herein), Section 605, assuming that it is applicable to telephone company accounting records at all, authorizes disclosure not only under subpoena, but on "demand of other lawful authority" (see Pet. App. No. 960, 20–23). A summons under Section 7602 is clearly a "demand of other lawful authority" as that term is used in Section 605.

Nor was there, as petitioners contend, an abuse of the administrative summons to obtain third party records under Section 7602. As the court below held, a summons under this statute is a proper device for obtaining records where the investigation may produce evidence for use in both civil and criminal proceedings (Pet. App. No. 960, 21). At the initial stage of the investigation, when the telephone company was summoned to produce its accounting records, the results of the investigation could not be clearly foreseen. The nature of illegal wagering activities is such that an investigation by a special agent has sometimes been a necessary prerequisite to the assessment of a civil tax liability based on the wagering tax statutes. Without his evidence that a person is engaged in a gambling business, no civil tax liability could be established.[4] To be sure, in different circumstances the ap-

[4] Cf. *Washington* v. *United States,* 402 F. 2d 3 (C.A. 4), pending on petition for a writ of certiorari, No. 22, this Term.

pearance of a special agent, following the audit of records by a revenue agent to determine the correctness of an income tax return, may signal the commencement of a criminal investigation. But that was not the situation here. Thus *Reisman* v. *Caplin*, 375 U.S. 440, 449, cited by the dissent below, is not to the contrary. Indeed, this Court, in stating that a governmental purpose to obtain evidence for use in a criminal case may constitute a defense to a summons, relied on *Boren* v. *Tucker*, 239 F. 2d 767 (C.A. 9), a case which upheld the right of a special agent to enforce an administrative summons.

Finally, as also pointed out in our memorandum in *Covello*, Section 605 does not cover telephone company toll records because its restrictions are limited to persons engaged in receiving and transmitting communications and does not include employees of communication carriers, such as accounting officers. For this reason, telephone company accounting records are entitled to the same treatment as records of other businesses. See *Nolan* v. *United States*, No. 9730 (C.A. 10), decided November 10, 1969.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

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